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ALI, *A Model Code of Pre-Arraignment Procedure* (Tent. Draft No. 5, 1972)	46
Amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Appellate Procedure (1972), 56 F.R.D. 143 *et seq.*	29, 30
Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same?*, 35 Mo. L. Rev. 281 (1970)	27, 45
1972 Annual report of the Director, Administrative Office of the United States Courts	3, 4, 46
Comment, *The District Attorney—A Historical Puzzle*, 1952 Wisc. L. Rev. 125	26
Comment, *The Preliminary Examination in the Federal System: A Proposal for a Rule Change*, 116 U. Pa. L. Rev. 1416 (1968)	27
Freed & Wald, *Bail in the United States: 1964* (1964)	59
Hamilton & Work, *The Prosecutor's Role in the Urban Court System: The Case for Management Consciousness*, 64 J. Crim. L. & Crim. 183 (1973)	41
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Kaplan, *The Prosecutorial Discretion—A Comment*, 60 N.W. U. L. Rev. 174 (1965)	41
Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* (1969)	45, 67
8 Moore, *Federal Practice*, ¶9.02[2] (Cipes ed., 1974)	32
National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (1973)	47
National Commission on Law Observance and Enforcement, *Report on Criminal Procedure* (1931)	50
Note, *The Functions of the Preliminary Hearing in Federal Pretrial Procedure*, 83 Yale L. J. 771 (1974)	46, 67
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Orfield, *Criminal Procedure from Arrest to Trial* (1947)	26, 27, 50
1 Orfield, *Criminal Procedure under the Federal Rules* (1966)	38, 62
President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: *The Courts* (1967)	66

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Proposed Amendments to Federal Rules of Criminal Procedure (1974), 62 F.R.D. 271 *et seq*	32
Rauh & Silbert, *Criminal Law and Procedure: D.C. Court Reform and Criminal Procedure Act of 1970*, 20 Amer. U. L. Rev. 252 (1970–1971)	59
Staff Memorandum, *Historical Analysis of the Preliminary Hearing*, Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, on S. 3475 and S. 945 (Federal Magistrates Act), 89th Cong., 2d Sess. and 90th Cong., 1st Sess	26, 27
Stephen, *A History of the Criminal Law of England* (1883)	50
Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 Mich. L. Rev. 1361 (1969)	26, 27, 30

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, PETITIONER

v.

ROBERT PUGH, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States is filing a brief in this case as *amicus curiae* at the request of the Court.[1] The issue in which the United States has an interest involves the question whether a defendant in custody and awaiting trial on criminal charges pursuant to an information filed by the prosecutor has a constitutional right to a preliminary hearing.[2] The court of appeals

[1] Letter to the Solicitor General from the Clerk of the Court dated May 28, 1974.

[2] The other question involved in this case is whether the district court properly exercised jurisdiction to consider respondents' claims in this class action suit for injunctive and declaratory relief, or whether it should have abstained from exercising jurisdiction for reasons of state-federal comity. We do not discuss that question in this brief because

held that the failure to afford such a hearing before a neutral and detached judicial officer deprives such a defendant of due process of law. Its decision also implies that the detention of the accused under such circumstances constitutes an unreasonable seizure of his person in violation of the Fourth Amendment.

While the decision of the court of appeals was rendered in the context of an attack on the system for initiation and maintenance of prosecutions in the State of Florida, the court's constitutional ruling necessarily has application to the criminal justice system of every jurisdiction in the United States, including the federal system.[3] It would follow from adoption of the court of appeals' ruling that Rule 5(c) of the Federal Rules of Criminal Procedure is unconstitutional insofar as that rule provides that "[a] defendant is entitled to a preliminary examination[4] * * * [which] shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody * * *; *provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set*

its resolution will have little if any impact on the administration of criminal justice in federal prosecutions.

[3] In the federal system and in the Superior Court of the District of Columbia, only misdemeanor prosecutions would be effected, since all felonies necessarily are prosecuted by grand jury indictment. U.S. Constitution, Fifth Amendment. In many States, however, both felony and misdemeanor prosecutions are initiated by information.

[4] Throughout this brief, the terms "preliminary examination" and "preliminary hearing" are used interchangeably.

for the preliminary examination" (emphasis supplied). The Federal Magistrates Act would be similarly affected. See 18 U.S.C. 3060(e).[5]

From a pragmatic standpoint, invalidation of the portion of Rule 5(c) set forth above, and the requirement of preliminary hearings in all cases initiated by information, would have relatively little adverse impact on the general federal criminal justice system. In felony cases, defendants in custody will either receive a preliminary hearing or be indicted by a grand jury, so that detention during the period from arrest to trial cannot be based solely upon the decision of the prosecutor to prefer charges.[6] While there are a substantial and growing number of federal misdemeanor prosecutions, the vast bulk of which are proceeded on by information rather than indictment,[7] the nature of the offenses (few of which involve

[5] Although not directly addressing the matter, the reasoning of the court of appeals also calls in question the constitutionality of that portion of Rule 9(a) of the Federal Rules of Criminal Procedure which provides that "[u]pon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information * * *," since the rule apparently mandates the issuance of a bench warrant without any review by the court of the probable cause underlying the prosecutor's charging decision.

[6] In more than 10% of felony cases during 1972, indictment was waived by the defendant. 1972 Annual Report of the Director, Administrative Office of the United States Courts II–52. In such instances, presumably, the waiver could properly be viewed as encompassing a waiver of the right, if any such right were recognized in this case, to have the grand jury's probable-cause-determining function performed by a magistrate.

[7] In fiscal year 1972, there were 10,268 misdemeanor cases commenced by information in the federal district courts. 1972

crimes of violence) and of the defendants makes it relatively rare that misdemeanor defendants are held in custody awaiting trial. Thus, the burden of holding preliminary hearings (or securing indictments) in this limited category of cases would not seriously impair the efficient overall performance of the federal criminal justice system.

There would, however, be a serious impact on the functioning of the local criminal justice system in the District of Columbia. Information supplied by the United States Attorney[8] shows that there are currently approximately 6,500 misdemeanor informations filed annually in the Superior Court of the District of Columbia and that defendants are unable to make bond and are therefore incarcerated pending trial in 15–20% of those cases (many of which do involve crimes of violence). Thus, if this Court adopts the holding of the court of appeals, an already overburdened court system would be required to hold between 1,000 and 1,300 additional preliminary hearings per year.

QUESTION PRESENTED

Whether a defendant in custody and awaiting trial on criminal charges pursuant to an information filed by the prosecutor has a constitutional right to a preliminary hearing.

Annual Report of the Director, Administrative Office of the United States Courts, *supra*, at II–52.

[8] The United States Attorney for the District of Columbia serves also in the capacity of local prosecutor for all criminal offenses (with certain exceptions, not relevant here, relating primarily to municipal and police regulations) which are prosecuted pursuant to the District of Columbia Code in the Superior Court of the District of Columbia. See 23 D.C. Code 101.

FEDERAL STATUTE AND RULES INVOLVED

18 U.S.C. 3060 provides in pertinent part:

> (a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.
>
> * * * * *
>
> (d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.
>
> (e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.
>
> * * * * *

Rule 5 of the Federal Rules of Criminal Procedure provides in pertinent part:

INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) *In General.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

* * * * *

(c) *Offenses Not Triable by the United States Magistrate.* If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement

made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

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Rule 5.1 of the Federal Rules of Criminal Procedure provides in pertinent part:

PRELIMINARY EXAMINATION

(a) *Probable Cause Finding.* If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the federal magistrate shall forthwith hold him to answer in district court. The finding of probable cause may be based upon hearsay evidence in whole or in part. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

(b) *Discharge of Defendant.* If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the federal magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

* * * * *

Rule 9 of the Federal Rules of Criminal Procedure provides in pertinent part:

WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) *Issuance.* Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

* * * * *

STATEMENT

On March 22, 1971, respondents Pugh and Henderson, subsequently joined by intervening respondents Turner and Faulk, filed a class action suit in the United States District Court for the Southern District of Florida against various Dade County, Florida officials, including petitioner Gerstein, the Dade County State Attorney. At the time the suit was filed, respondents Pugh and Henderson were incarcerated in the Dade County Jail upon informations filed by the State Attorney, as permitted by Article I, Section 15(a) of the Florida Constitution. Respondents sought an injunction and a declaration that a preliminary hearing before a committing magistrate on probable cause after arrest and before trial was compelled by the Fourth Amendment and by the Due Process Clause of the Fourteenth Amendment.

On October 12, 1971, the district court issued an opinion and judgment declaring unconstitutional the Florida practice of denying a judicial determination of probable cause to persons proceeded against by in-

formation and concluding that arrested persons, whether or not released on bond, have a constitutional right to a judicial hearing on the question of probable cause (Pet. App. 29–46; 332 F. Supp. 1107). The court directed that a plan for the implementation of its order be submitted (Pet. App. 46; 332 F. Supp. at 1115–1116). Pursuant to the court's order, E. Wilson Purdy, the Director of Public Safety of Dade County, submitted a plan, adopted by the court with modifications on January 25, 1972 (Pet. App. 47–54; 336 F. Supp. 490), which provided for preliminary hearings within four days of initial appearance for those unable to post bond and within ten days for all other defendants (Pet. App. 49; 336 F. Supp. at 491). Petitioner Gerstein appealed to the Fifth Circuit Court of Appeals, and that court stayed the Purdy Plan pending appeal.

Shortly thereafter, the judges of Dade County implemented their own plan for preliminary hearings, under which the State Attorney retained the power, given him by Florida law, to bypass the preliminary hearing by filing an information. The court of appeals thereupon lifted its stay order and directed the district court to make specific findings of fact on the constitutional deficiencies, if any, of the plan implemented by the Dade County judges. Meanwhile, the Supreme Court of Florida amended its Rules of Criminal Procedure to provide, *inter alia,* for preliminary hearings. The amended rules, however, provide that preliminary hearings are available only to those charged with felonies and that persons proceeded against by information filed by the State Attorney are

not entitled to such hearings. Florida Rules of Criminal Procedure, Rule 3.131(a).[9]

On remand from the court of appeals, the district court concluded that the practice that permits the State Attorney to obviate the requirement of a preliminary hearing by filing an information does not afford due process of law and violates the Fourth Amendment; that providing different time limits for preliminary hearings for those charged with capital offenses and offenses punishable by life imprisonment from those set in other cases violates both due process and equal protection; and that the authorization for the State Attorney to refile an information if a defendant is discharged by a judicial officer is a violation of the Fourth and Fourteenth Amendments (Pet. App. 55–69; 355 F. Supp. 1286). The court also concluded that the denial of preliminary hearings to misdemeanants violates the Fourth Amendment and both the due process and equal protection clauses of the Fourteenth Amendment (Pet. App. 60–65; 355 F. Supp. at 1289–1291). Accordingly, it required a judicial probable cause determination for all misdemeanants who face potential imprisonment, but not those charged with violations that carry no possible prison term (Pet. App. 61–62; 355 F. Supp. at 1290).

On August 15, 1973, the court of appeals affirmed the judgment of the district court in substantial part (Pet. App. 1–28; 483 F. 2d 778). The court held that due process requires a preliminary hearing on prob-

[9] The Rule provides, in pertinent part: "A defendant, unless charged in an information or indictment, has the right to a preliminary hearing on any felony charge against him."

able cause before a judicial officer "when the state attorney prosecutes presently-confined arrestees by filing an information" (Pet. App. 10; 483 F. 2d at 783). It also concluded that "[n]o sufficient justification exists for disallowing preliminary hearings for misdemeanants" (Pet. App. 23; 483 F. 2d at 788). Finally, the court vacated that portion of the district court's judgment relating to two specific sanctions imposed,[10] because it would "not presume that such onerous sanctions" were any longer necessary to insure compliance with the amended Florida Rules of Criminal Procedure as modified by the court's opinion (Pet. App. 28; 483 F. 2d at 790).

This Court granted certiorari on December 3, 1973 (414 U.S. 1062); briefs were filed, and the Court heard argument on March 25, 1974. On April 15, 1974, the Court ordered that the case be restored to the calendar for reargument, and on May 28, 1974, the Court invited the United States and the Attorneys General of the fifty States to file briefs as *amici curiae*.

SUMMARY OF ARGUMENT

1. Our analysis begins with the contention that in criminal cases that may constitutionally be commenced by an information filed by the prosecutor, due process does not require an opportunity for pre-trial

[10] The sanctions were: (1) after a magistrate's finding of no probable cause, the prosecutor only could proceed by grand jury indictment; and (2) if no preliminary hearing were provided within the prescribed time limits, the charges would be withdrawn and the defendant released from custody. The charges could be refiled, but, if twice withdrawn, the prosecutor could only proceed by grand jury indictment. See Pet. App. 51, 53; 336 F. Supp. at 492–493; Pet. App. 27–28; 483 F. 2d at 790.

review of the charging decision by a judicial officer. While the court of appeals focused its concern not on the right of the prosecutor to file charges but on the deprivation of liberty entailed in pre-trial detention, the nature of the remedy selected by the court (a preliminary hearing) undermines this traditional premise of our criminal justice system.

It is established that due process does not require all prosecutions to be initiated by grand jury indictment and that, where authorized by law, an information filed by the prosecutor is a constitutionally permissible method by which to bring a criminal charge. *Hurtado* v. *California*, 110 U.S. 516. Moreover, a prosecutor's information, if valid on its face, is enough to call for a trial of the case on the merits. See *Costello* v. *United States*, 350 U.S. 359, 363. Finally, this Court has consistently held that no preliminary hearing is required by the Constitution prior to the formal accusation by the prosecutor's information. *Lem Woon* v. *Oregon*, 229 U.S. 586; *Ocampo* v. *United States*, 234 U.S. 91; *Beck* v. *Washington*, 369 U.S. 541.

An underlying assumption and natural consequence of these decisions is that, if no hearing is required before the filing of the formal charge (either indictment or information), none can be required after the formal charge is brought, because, historically, the hearing was "preliminary" to the filing of such charges in a court of competent trial jurisdiction. Its limited purpose was to allow the magistrate to determine whether there was then sufficient evidence upon a complaint by a citizen or police official to "bind over" a suspect for later stages of the criminal process pending deter-

mination of whether to file the formal charge. No legitimate purpose is served by a preliminary hearing after the charge has been filed, because the information or indictment itself establishes that the evidence is sufficient to require the suspect to answer the charges against him at trial. See *Costello* v. *United States, supra; Albrecht* v. *United States,* 273 U.S. 1. Moreover, the Court's opinion in *Ocampo* not only supports the proposition that no preliminary hearing need precede the trial, but it also makes clear that the information filed by the prosecutor is sufficient to require the court to issue a warrant to bring the accused before it for trial. See also Fed. R. Crim. P. 9(a); *Albrecht* v. *United States, supra;* cf. *Ex parte United States,* 287 U.S. 241, 249–250.

Conferral of the charging power on the prosecutor, free of pre-trial judicial supervision, is neither unfair nor inconsistent with recent decisions of this Court. Both *Coolidge* v. *New Hampshire,* 403 U.S. 443, and *Shadwick* v. *City of Tampa,* 407 U.S. 345, were concerned with the kind of probable cause determination traditionally made by magistrates preliminary to the issuance of warrants. While there are historical and practical reasons for a magisterial determination of probable cause for a warrant in the investigative phase of a criminal case, assessment of the evidence for sufficiency to support the bringing of formal criminal charges traditionally has been a prosecutorial function (or a function of the prosecutor together with a grand jury, but never of the judiciary).

Nor does *Morrissey* v. *Brewer,* 408 U.S. 471, require a preliminary hearing in the situation

presented here. That case requires only that someone other than the parole officer who has recommended revocation make a preliminary evaluation that there is probable cause to believe that conditions of parole have been violated. In the criminal justice system, this type of preliminary evaluation properly is made by the prosecutor, who reviews the decision of the arresting officer before deciding to submit the case to the grand jury for its consideration or before filing an information. Moreover, in making the decision whether to prefer charges, the prosecutor has both the duty and the natural incentive to assess fairly the relevant factors—the strength of the evidence, the likelihood of conviction and the efficient utilization of limited prosecutorial resources. See ABA Standards for Criminal Justice, *The Prosecution Function,* §§ 3.4(a), 3.9(b) (Approved Draft, 1971).

Even if preliminary hearings are sometimes to be required in cases initiated by information, it is not unconstitutional to differentiate between felony and misdemeanor cases in this regard. *Argersinger* v. *Hamlin,* 407 U.S. 25, does not support a contrary conclusion. *Argersinger* was concerned with the requirements of the Sixth Amendment, which by its terms applies to "all criminal prosecutions." The due process right to a preliminary hearing, on the other hand, necessarily relates to the method by which charges are brought, and the Fifth Amendment itself distinguishes between felony and misdemeanor prosecutions in that regard. Moreover, in considering misdemeanor cases (four to five million annually in the state courts, ten thousand

in the federal courts and 6,500 in the Superior Court of the District of Columbia), it is particularly appropriate to balance the supposed benefit to the accused from a preliminary hearing against the strain on the criminal justice system that will be imposed by diverting overburdened judges, court personnel, lawyers and facilities from the task of speedily disposing of cases at trial. In the case of misdemeanors at least, the due process balance should be struck on the side of speedy trial rather than preliminary hearing.

2. Because the court of appeals' holding was expressly limited to "presently-confined arrestees" (Pet. App. 10; 483 F. 2d at 783), it is clear that the court's concern was with incarceration of defendants pending trial. That being so, the court selected a remedy (the preliminary hearing) which is functionally and historically inappropriate to meet the problem. To the extent that possibly unjustified pre-trial incarceration was its concern, the focus of the court's opinion should have been not on preliminary hearings but on the Florida bail procedures.

Due process is afforded, we submit, when relevant matters concerning the strength of the prosecutor's case can be considered in the course of the bail proceedings. In the federal system and in the Superior Court of the District of Columbia, "the nature and circumstances of the offense charged" and "the weight of the evidence against the accused" are factors considered by the judicial officer in determining appropriate conditions of release pending trial. 18 U.S.C. 3146(b); 23 D.C. Code 1321(b). Since these are the very factors that respondents would have the

judicial officer consider at a preliminary hearing, the bail hearing, though a less formal proceeding, is the functional equivalent of the hearing that respondents seek as a constitutional right. In a weak case, the consideration of these factors nearly always would lead to an accused's release on bond (but, of course, not to dismissal of the charges against him). In the rare case where there appears to be both a weak government case and a strong likelihood of flight before trial, the court, in the exercise of its discretion to control its calendar, may schedule the trial immediately or on an expedited basis. The power of the court in matters of bail and with respect to its calendar thus affords ample judicial control over the problem of potentially unjustified pre-trial incarceration to satisfy the requirements of due process.

3. Assuming *arguendo* that the bail system is not an adequate check on unwarranted detention of defendants pending trial and that some form of preliminary probable cause determination by a judicial officer is constitutionally required, it does not follow that due process requires adoption of a formal preliminary hearing as the vehicle for this determination.

The magistrate's assessment of probable cause is not inherently the kind of inquiry that requires live witnesses and cross-examination, as is evidenced by the fact that search and arrest warrants are authorized on the basis of *ex parte* applications supported by affidavits (which may be based in whole or in part on hearsay evidence). Due process would be satisfied by a similar procedure for the determination of probable cause after arrest and the filing of an information.

Any probable cause determination which is required could be fairly and efficiently made at the bail hearing, which is much ess formal than the preliminary hearing sought by respondents. The determination of probable cause, like bail and sentencing decisions, can be made on the basis of information proffered in open court by counsl (with the judge or magistrate retaining power, in the occasional case where he considers it necessary, to require live witnesses).

Recent due process cases of this Court relied upon by the court of appeals and by respondents [11] do not require a more fornalized procedure to determine probable cause. Those cases concerned with a requirement of notice and hearing before what is effectively a final judgment in the case (*Constantineau* and *Stanley*) are obviously inapplicable, because the filing of an information does not represent a final disposition of either the mater of pre-trial detention (considered in the bail proceeding) or the ultimate question of guilt or innocence (resolved at trial). Those cases involving the constitutional validity of temporary deprivations in advance of final judgment (*Sniadach, Goldberg, Bell* and *Fuentes*) were decided in wholly different contexts and involved individualized consideration of the kind of process that is due before a particular deprivation of property takes place. Due process does not always require that notice and opportunity for hearing precede

[11] *Fuentes* v. *Shevin*, 407U.S. 67; *Stanley* v. *Illinois*, 405 U.S. 645; *Bell* v. *Burson*, 402 U.S. 535; *Wisconsin* v. *Constantineau*, 400 U.S. 433; *Goldberg* v. *Kelly*, 397 U.S. 254; *Sniadach* v. *Family Finance Corp.*, 395U.S. 337.

the taking of property or liberty; indeed, certain decisions may be made *ex parte* and by non-judicial or administrative officers. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, No. 73–157, decided May 15, 1974; *Michell* v. *W. T. Grant Co.*, No. 72–6160, decided May 13, 1974. In the criminal justice system, while an arrest may be made without a warrant by a police officer, the prosecutor then carefully reviews the case brought by the police (cf. *Calero-Toledo* v. *Pearson Yacht Leasing Co., supra*) and determines whether there is evidence sufficient to file a formal charge. Moreover, the bail hearing provides the opportunity for an informal judicial examination of the case and for the restoration of at least conditional liberty pending a final determination of the case on its merits. No comparable procedure for review and protection of the interests at stake existed in any of the cases relied upon by the court of appeals and by respondents.

Finally, our analysis of the requirements of due process necessarily considers the costs to the criminal justice system of requiring preliminary hearings with live witnesses in every case. Such a requirement will divert already overburdened judges, prosecutors, defense lawyers, court personnel and court facilities from the task of speedily disposing of cases. Moreover, the very real problem of securing the cooperation of lay witnesses will be exacerbated by procedures requiring them to spend additional time waiting to testify and actually testifying in court; and law enforcement officers, called to court for such preliminary matters, will be taken away from the active prevention and investigation of crime.

ARGUMENT

In the first part of our argument (pp. 22–47, *infra*), we contend that in criminal cases that may constitutionally be commenced by an information filed by the prosecutor, due process does not require an opportunity for pre-trial review of the charging decision by a judicial officer. We will show that both historically and in terms of its present function, a preliminary hearing is inappropriate once formal criminal charges have been preferred by way of information. Moreover, conferral of the charging power on the prosecutor, free of pre-trial judicial supervision, is neither unfair nor inconsistent with recent decisions of this Court. Finally, we urge that any requirement for preliminary hearings that the Court may recognize, can constitutionally and should appropriately be confined to felony cases.

Our argument in Part II, *infra*, pp. 48–53, is premised on the fact that the court of appeals was concerned not about the right of the prosecutor to prefer charges by information, but about the fact of pre-trial incarceration without the opportunity for a judicial determination whether there is evidence sufficient to support the charge. We contend, however, that due process is afforded when relevant matters concerning the strength of the prosecution's case can be considered in the course of the bail proceedings. Pre-trial release (but not dismissal of the charges) may be appropriate in a weak case.

Assuming, *arguendo*, that the Court concludes that due process requires an independent probable cause

determination by a judicial officer before trial, we contend in Part III, *infra*, pp. 53–67, that other means than the preliminary hearing are permissible to satisfy that requirement. Due process can be afforded by an informal judicial procedure such as that provided by the bail hearing or in reviewing affidavits in support of warrants. Recent due process decisions of this Court do not require a more formal procedure in the nature of a preliminary hearing to determine probable cause. Finally, we suggest that the costs to the criminal justice system of requiring probable cause determination by formal preliminary hearing significantly outweigh the benefits which would accrue.

I

IN CRIMINAL CASES THAT MAY CONSTITUTIONALLY BE COMMENCED BY AN INFORMATION FILED BY THE PROSECUTOR, DUE PROCESS DOES NOT REQUIRE AN OPPORTUNITY FOR PRE-TRIAL REVIEW OF THE CHARGING DECISION BY A JUDICIAL OFFICER

We begin our analysis by showing that the Constitution does not require pre-trial judicial review of the sufficiency of the evidence to support a prosecutor's unilateral determination, solemnized in a formal information filed with the court, that an individual should be required to stand trial to answer criminal charges. While the court of appeals focused its concern not on the onus of trial, but on the deprivation of liberty entailed in pre-trial detention, the nature of the remedy selected by the court to eliminate the risk of unjustified detention (a preliminary hearing) implicitly undermines, in our view, the traditional premise of our criminal justice system that the charg-

ing decision in certain categories of cases (limited to misdemeanors and petty offenses in the federal system) resides with the prosecutor and is not subject to pre-trial judicial review.[12] Having isolated and considered the respective roles of court and prosecutor in the charging decision, including the function of the preliminary hearing, the ground is then cleared to consider (as we do in Part II, *infra*) the problem of pre-trial custody and the nature of the remedies appropriate to minimize the risk of unjustified pre-trial detention.

A. HISTORICALLY AND IN TERMS OF ITS PRESENT FUNCTION, A PRELIMINARY HEARING IS INAPPROPRIATE ONCE FORMAL CRIMINAL CHARGES HAVE BEEN PREFERRED

It has long been established that due process does not require all prosecutions to be initiated by grand jury indictment and that, where authorized by law, an information filed by the prosecutor is a constitutionally permissible method by which to bring a criminal charge. *Hurtado* v. *California,* 110 U.S. 516.[13] More-

[12] Except, of course, that an information, like an indictment, is subject to pre-trial attack on grounds of facial invalidity or through the establishment of certain types of defenses—*e.g.*, statute of limitations, double jeopardy—not entailing an assessment of "probable cause." The availability of this kind of challenge to a criminal charge is not at issue here, nor is the question of the relief available for retaliatory or discriminatory prosecutions.

[13] See also *McNulty* v. *California*, 149 U.S. 645, 648; *Hodgson* v. *Vermont*, 168 U.S. 262, 272; *Bollen* v. *Nebraska*, 176 U.S. 83; *Maxwell* v. *Dow*, 176 U.S. 581; *Dowdell* v. *United States*, 221 U.S. 325, 332; *United States* v. *Pickard*, 207 F.2d 472 (C.A. 9); *Rivera* v. *Government of the Virgin Islands*, 375 F.2d 988 (C.A. 3); *United States* v. *Funk*, 412 F.2d 452, 454–455 (C.A. 8); *Buchannon* v. *Wainwright*, 474 F.2d 1006 (C.A. 5).

over, under current federal practice, "[a]n information may be filed without leave of court." Fed. R. Crim. P. 7(a).[14] Equally accepted hitherto is the proposition that "an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Costello* v. *United States,* 350 U.S. 359, 363. See also *Lawn* v. *United States,* 355 U.S. 339, 349; *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 599. Finally, this Court has stated on numerous occasions that there is no constitutional requirement of a preliminary hearing prior to the initiation of formal criminal charges, whether by indictment (*Goldsby* v. *United States,* 160 U.S. 70, 73; *United States ex rel. Hughes* v. *Gault,* 271 U.S. 142, 149; *United States ex rel. Kassin* v. *Mulligan,* 295 U.S. 396, 400), or by information, where the prosecutor is authorized by law to proceed in that manner. *Lem Woon* v. *Oregon,* 229 U.S. 586; *Ocampo* v. *United States,* 234 U.S. 91; *Beck* v. *Washington,* 369 U.S. 541.[15]

[14] This was not always so. See *Albrecht* v. *United States*, 273 U.S. 1. Under the *Albrecht* decision, however, leave of court would be freely granted even though the information was not verified or accompanied by affidavits, for the oath of office of the United States Attorney was deemed "sufficient to give verity to the allegations of the information." *Albrecht* v. *United States*, *supra*, 273 U.S. at 6.

[15] Every circuit court of appeals that has considered the question of whether there is a constitutional right to a preliminary hearing, including the Fifth Circuit prior to this case, has concluded that there is no such right See *Sciortino* v. *Zampano*, 385 F.2d 132, 134 (C.A. 2), certiorari denied, 390 U.S. 906 (indictment); *Government of the Virgin Islands* v. *Bolones*, 427 F.2d 1135, 1136 (C.A. 3) (information); *Barber* v. *United States*, 142 F.2d 805, 807

Respondents argue, however, that while a preliminary hearing may not be required prior to the filing of the formal criminal charge, due process of law requires a determination of probable cause by a neutral and detached magistrate subsequent to the filing of an information. They do not urge that such a hearing is required when the prosecutor proceeds by grand jury indictment (Respondents' Brief, p. 2), although both this Court and Congress have concluded that the indictment and the information are entitled to equal dignity as charging documents (see, *e.g., Costello* v. *United States, supra*),[16] and that no preliminary

(C.A. 4), certiorari denied, 322 U.S. 741 (indictment); *Buchannon* v. *Wainwright*, 474 F.2d 1006 (C.A. 5) (information); *United States* v. *Smith*, 343 F.2d 847, 850 (C.A. 6), certiorari denied, 382 U.S 824 (indictment); *United States* v. *Funk*, 412 F.2d 452, 455–456 (C.A. 8) (information); *United States* v. *Pickard*, 207 F.2d 472, 474 (C.A. 9) (information); *Pearce* v. *Cox*, 354 F.2d 884, 891 (C.A. 10), certiorari denied sub nom. *Charlton* v. *Cox*, 384 U.S. 976 (information); *Crump* v. *Anderson*, 352 F.2d 649, 651–652 (C.A.D.C.) (indictment and information); but see *Brown* v. *Fauntleroy*, 442 F.2d 838 (C.A.D.C.).

State courts that have considered the matter also have concluded that there is no constitutional right to a preliminary hearing. See, *e.g., Washington* v. *State*, 213 Ark. 218, 210 S.W. 2d 307; *State* v. *Mazzadra*, 28 Conn. Super. 252, 258 A. 2d 310; *Smith* v. *O'Brien*, 109 N.H. 317, 251 A. 2d 323; *State* v. *Singleton*, 253 La. 18, 215 So. 2d 838; *State* v. *Jackson*, 43 N.J. 148, 203 A. 2d 1; *Commonwealth* v. *O'Brien*, 181 Pa. Super. 382, 124 A. 2d 666; *State ex rel. Leighton* v. *Henderson*, 448 S.W. 2d 82 (Tenn. Crim. App.); *Benson* v. *Commonwealth*, 190 Va. 744, 58 S.E. 2d 312; *State* v. *Ollison*, 68 Wash. 2d 65, 411 P. 2d 419, certiorari denied *sub nom. Wallace* v. *Washington*, 385 U.S. 874; *Commonwealth* v. *Britt*, 285 N.E. 2d 780 (Mass.); *Shields* v. *State*, 126 Ga. App. 544, 191 S.E. 2d 448. See also *Freeman* v. *Smith*, 301 A. 2d 217 (D.C. App.).

[16] In *Ewing* v. *Mytinger & Casselberry*, *supra*, 339 U.S. at 599, it was said by way of example: "The impact of the initia-

examination is required "if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination." Fed. R. Crim. P. 5(c).[17] See also 18 U.S.C. 3060(e).

The rationale underlying the provisions in the Federal Magistrates Act and the Federal Rules that cut off the right to a preliminary hearing after the filing of the formal charge (indictment or information) is found in the history and purpose of the preliminary hearing.[18] In England, at a time when there was neither a police force nor a public prosecutor, the

tion of judicial proceedings is often serious. Take the case of the grand jury. It returns an indictment against a man without a hearing. It does not determine his guilt; it only determines whether there is probable cause to believe he is guilty. But that determination is conclusive on the issue of probable cause. As a result the defendant can be arrested and held for trial. * * * The impact of an indictment is on the reputation or liberty of a man. The same is true where a prosecutor files an information charging violations of the law."

[17] While this provision was added to the Federal Rules of Criminal Procedure in 1972 in order to conform the Rules with the Federal Magistrates Act of 1968, 82 Stat. 1107, it is consistent with prior law. *See Crump* v. *Anderson*, 352 F.2d at 656 *supra*; *Barrett* v. *United States*, 270 F.2d 772 (C.A. 8).

[18] For an excellent discussion of the history of the preliminary examination, see Staff Memorandum, *Historical Analysis of the Preliminary Hearings*, Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, on S. 3475 and S. 945 (Federal Magistrates Act), 89th Cong., 2d Sess. and 90th Cong., 1st Sess. 268–271 (hereafter referred to as "Staff Memorandum"). See also Orfield, *Criminal Procedure from Arrest to Trial*, ch. 2, pp. 49–100 (1947); Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 Mich. L. Rev. 1361, 1365–1370 (1969).

amicus brief

Supreme Court, U. S.
FILED
SEP 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

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BRIEF OF AMICUS CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association is an organization composed of over 1,000 legal services and defender offices in the United States. Founded in 1911, it includes over 4,000 individual and professional members who have a major concern with safeguarding the rights of criminal defendants and, in particular, indigent criminal defendants.

The NLADA is disturbed at the often lengthy pre-trial detention of criminal defendants. The situation is even more disturbing where there has been no judicial determination concerning the basis for the criminal accusation which has resulted in the incarceration. Pretrial detention even without a judicial determination of the basis for the accusation is obviously more likely for the indigent, who is unable to post bond, than for the rich. Because we believe incarceration without a judicial imprimatur violates the constitutional rights of indigent defendants, we file this brief in support of respondents.

NLADA files this Amicus Curiae Brief pursuant to Supreme Court Rule 42(2). The written consent of counsel for all parties has been secured.

STATEMENT OF THE CASE

Amicus Curiae adopts respondents' Statement of the Case.

STATEMENT OF THE FACTS

Amicus Curiae adopts respondents' Statement of the Facts.

ISSUE PRESENTED

Whether the due process clause and the constitutional prohibition against unreasonable seizures of the person prohibit the pretrial incarceration of accused persons without a judicial determination of probable cause for their arrest.

ARGUMENT

THE INCARCERATION OF RESPONDENTS WITHOUT ANY JUDICIAL DETERMINATION OF PROBABLE CAUSE AFTER A HEARING VIOLATES THEIR RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

In view of the arguments set forth by petitioner, it is important to note initially what the issues are and what they are not. Respondents, representing a class of pretrial detainees, contest the right of the State to hold them in detention without having provided a hearing before a neutral magistrate to determine whether there is probable cause for the detention. Respondents do not contest the adequacy of the information filed by the State's Attorney as a jurisdictional basis for the continuation of the prosecution against them. Thus, most of the cases relied upon by petitioner are inapposite, since they deal with nothing more than the sufficiency of a legal process as the basis for a criminal proceeding.

In *Hurtado* v. *California,* 110 U.S. 516, 4 S.Ct. 111 (1884), the only issue raised was whether a defendant could be prosecuted based on an information rather than an indictment. This Court held that the indictment requirement of the Fifth Amendment did not apply to the States. Not only was the issue totally irrelevant to what is argued here, but it is significant to note that under the law of California, an information could be filed only after examination and commitment by a magistrate, which examination consisted of the giving of testimony under oath by witnesses. *Id.* at 517-518, 4 S.Ct. at 112.

In *Albrecht* v. *United States*, 273 U.S. 1, 47 S.Ct. 250 (1927), the defendants had claimed that "because of defects in the information and affidavits attached, *there was no jurisdiction in the District Court . . .*" *Id.* at 4, 47 S.Ct. at 251. (emphasis added). This Court merely held that an illegal arrest did not deprive a court of jurisdiction. *Id.* at 8, 47 S.Ct. at 252. What this Court did not decide, and was not called upon to decide, was whether incarceration while the proceedings were going on would be illegal. *Id.* at 10, 47 S.Ct. at 253.

In *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 407 (1956), the issue for decision was whether a defendant could be required to stand trial where an indictment was based upon incompetent evidence. It was held that

> "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by a prosecutor, if valid on its face, *is enough to call for trial of the charge on the merits.*" *Id.* at 363, 76 S.Ct. at 409 (footnote omitted) (emphasis added).

Thus, *Costello's* application to the prosecutor's information situation goes no further than to permit trial on such an information. It certainly does not permit incarceration based on nothing more than a prosecutor's charge.

The holding of *Lawn* v. *United States*, 355 U.S. 339, 78 S.Ct. 311 (1959), is similarly limited to the sufficiency of a process to require a defendant to stand trial.

> ". . . one indictment returned by a legally constituted nonbiased grand jury, like an information drawn by a prosecutor, if valid on its face, *is enough to call for a trial of the charge on the merits and satisfies the requirements of the Fifth Amendment.*" *Id.* at 349, 78 S.Ct. at 317 (emphasis added).

As stated above, the question in this case is not whether a criminal prosecution may be based upon a prosecutor's information. The real question is whether such an information without a judicial determination of probable cause can justify the incarceration of respondents. The answer to that question must be in the negative.

The Fourteenth Amendment to the federal constitution prohibits any State from depriving any person of liberty without due process of law. This Court has held, with respect to other deprivations, that due process minimally requires a full hearing, substantially contemporaneous with the taking,* at which there is an opportunity to be heard before an independent and neutral decisionmaker. See, *e.g.*, *Mitchell* v. *W.T. Grant*, ... U.S. ....., 94 S.Ct. 1895, 1901, 1902 (1974) (property); *Fuentes* v. *Shevin*, 407 U.S. 67, 81, 82, 83, 92 S.Ct. 1983, 1994, 1995, 1996 (1972) (property); *Stanley* v. *Illinois*, 405 U.S. 645, 647, 649, 92 S.Ct. 1208, 1211 (1972) (custody of children); *Bell* v. *Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591 (1971) (driver's license); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971) (right to purchase liquor); *Goldberg* v. *Kelly*, 397 U.S. 254, 267-268, 271, 90 S.Ct. 1011, 1020, 1022 (1970) (public assistance); *Sniadach* v. *Family Finance*

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* Some situations require that the hearing be held prior to the taking, *e.g.*, *Goldberg* v. *Ke'ly*, 397 U.S. 254, 266, 90 S.Ct. 1011, 1019 (1970), *Sniadach* v. *Family Finance Corporation*, 395 U.S. 337, 341-342, 89 S.Ct. 1820, 1822 (1969), some that the hearing be held shortly after the taking, *e.g.*, *Mitchell* v. *W. T. Grant*, ... U.S. ...., ..., 94 S.Ct. 1895, 1901, 1902 (1974), depending on the nature of the competing interests. Amicus Curiae agrees with respondents that because of the nature of the criminal process it would not be feasible for the hearing to be required prior to arrest. A hearing held promptly after arrest would satisfy the requirements of due process while at the same time accomodating the governmental interest in the speedy apprehension of suspects.

Corporation, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823 (1969) (garnishment of wages).

More directly relevant, this Court has been equally solicitous with respect to the due process rights of persons whose right to conditional liberty is at issue. See, *e.g., Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593 (1972) (parolees); *Gagnon* v. *Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756 (1973) (probationers). Prior to final adjudication of their right to remain at liberty, parolees and probationers are entitled to a prompt preliminary hearing, before an independent decisionmaker, with a right to be heard on the question of whether there is probable cause. *Morrissey* v. *Brewer, id.* at 485-487, 92 S.Ct. at 2602-2603. Thus, the right to a preliminary hearing is not negated by the existence of procedures at a later time for a final determination of rights. See, also, *Fuentes* v. *Shevin, id.* at 81-82, 92 S.Ct. at 1995, 1996; *Bell* v. *Burson, id.* at 540, 91 S.Ct. at 1590.

With respect to the identity of the independent decisionmaker, and the standard to be applied by him, the Fourth Amendment is instructive. That provision protects the "right of the people to be secure in their persons . . . against unreasonable . . . seizures . . ." and regulates the making of arrests. An arrest must be based upon probable cause to believe that a crime has been committed and the person arrested has committed it. *Wong Sun* v. *United States,* 371 U.S. 471, 479, 83 S.Ct. 407, 413 (1963). This, then, is the standard against which the legality of a person's incarceration to answer to criminal charges must be measured.

Further, the Fourth Amendment requires that the independent decisionmaker be a "neutral and detached" magistrate, *Shadwick* v. *City of Tampa,* 407 U.S. 345, 348, 92 S.Ct. 2119, 2122 (1972). The State's Attorney is certainly neither an "independent decisionmaker" as required by due process* nor a neutral and detached magistrate as required by the Fourth Amendment. *Coolidge* v. *New Hampshire,* 403 U.S. 443, 453, 91 S.Ct. 2022, 2031 (1970). See also *Shadwick* v. *City of Tampa, supra.*

The procedure followed by the State of Florida permits a prosecuting official in an *ex parte* proceeding to deprive respondents of their liberty by the filing of an information. This process provides neither the full hearing before an independent decisionmaker with opportunity to be heard required by the due process clause nor the neutral magistrate determining probable cause required by the Fourth Amendment. It therefore violates respondents' constitutional rights.

In *Ocampo* v. *United States,* 234 U.S. 91, 34 S.Ct. 712 (1912), the defendants did contest the use of a prosecutor's information as the basis for arrest as well as the basis for prosecution. However, that case did not resolve the question at issue here and contains several factors which make it substantially distinguishable from the case at bar.

The information in *Ocampo* included a sworn assertion by the prosecuting official that he had made a preliminary investigation, which included the examination of witnesses under oath, a procedure required by statute. *Id.* at 92-93, 34 S.Ct. at 712-713. Here of course there is no such statu-

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* In *Morrissey* v. *Brewer,* 408 U.S. 471, 486, 92 S.Ct. 2593, 2603 (1972), this Court explicitly excluded as an independent decisionmaker one who "has made the report of parole violation or has recommended revocation". Surely the prosecutor who has determined upon prosecution is in the same posture.

tory requirement. Petitioner has asserted in its brief that it is its "policy and practice" to conduct an independent examination. On oral argument, petitioner claimed that with respect to the individual respondents (although not with respect to the class), witnesses had been examined. Obviously, however, the safeguarding of constitutional rights cannot be made to depend upon "policy and practice" or the possibility that in a particular case a particular procedure will be followed.*

Second, *Ocampo* was decided before this Court held that the Fourth Amendment applied to the States. Thus, its holding that a prosecuting official may perform the "quasi-judicial" function of determining probable cause, *id.* at 98, 34 S.Ct. at 715, did not establish what was permissible under Fourth Amendment standards and has been overruled *sub silentio* by *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 453, 91 S.Ct. at 2031.

Third, the defendants in *Ocampo* had in fact posted bond, *id.* at 101, 34 S.Ct. at 716, and therefore the question of the legality of their continued incarceration was academic. This Court decided no more than that an initial arrest may be based on a prosecutor's information which itself is based on the examination of witnesses under oath. *Id.* at 100-101, 34 S.Ct. As argued above, however, due process requires much more to justify a continued incarceration, and the *Ocampo* decision is not controlling.

The interest of respondents in remaining free until a judicial officer or body has determined that they should be incarcerated is obviously at least as substantial as the in-

* In any case, the issues should be determined on the record established in the lower courts. *Morrissey* v. *Brewer, supra,* 408 U.S. at 476-477, 92 S.Ct. at 2598.

terest in public assistance, the purchase of liquor, a driver's license or conditional liberty. The accused is presumed innocent, and his liberty should not be taken without good cause. An accusation, even where brought by a prosecuting official, does not necessarily result in conviction.* Yet the deprivations resulting from loss of liberty can never be made good.

In addition, the defendant who remains incarcerated during the criminal proceedings is at a substantial disadvantage with respect to his ability to make a defense. His opportunity to consult with counsel is limited; his ability to assist in his defense by aiding in the investigation of his case is non-existent. It is well-known that because of crowded calendars and the substantial backing of criminal cases in most jurisdictions, the pre-trial detention period may extend for many, many months.

These hardships, which necessarily fall with greater impact upon the indigent or relatively indigent defendant who by definition is less able to obtain his liberty by posting bond, should not occur because of some assumption that the prosecutor will in good faith initiate only prosecutions which are well-founded. The prosecutor necessarily has an interest in obtaining criminal convictions, and he may well, whether from overzealousness or carelessness, institute proceedings as to which there is no probable cause. Even should a sufficient basis for prosecution and conviction ultimately develop, there has still been a deprivation of a substantial right which can never be cured. And, as indicated above, the mere fact of incarceration may well make it more likely that a prosecution will be

* In any event, the right to contest a preliminary detention at the time in no way hinges upon ultimate vindication. See *Fuentes* v. *Shevin,* 407 U.S. 67, 87, 92 S.Ct. 1983, 1997-1998 (1972).

successful, thus creating what is tantamount to a self-fulfilling prophecy. R. Kasanof and E. Single, "The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City", 8 Crim. L. Bull. 459 (1972); Wise, "Bail Reform in American Cities", 9 Crim. L. Bull. 770, 785-6 (1973).

This is not to say that every arrested defendant has an absolute right to liberty until and if he is convicted. But it is to say that the deprivation of liberty should not continue unless a neutral magistrate, after a full hearing, has determined that there is probable cause to hold him.

We ask this Court to accord to arrested defendants the same rights which it has granted to parolees, probationers, possessors of property and beneficiaries of public assistance—the right to a prompt and full hearing before a neutral and detached magistrate before he is deprived of his freedom.

CONCLUSION

For the above reasons, Amicus Curiae, the National Legal Aid and Defender Association, respectfully urges that the judgment of the lower court be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
FILED
OCT 11 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

v.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

SECOND SUPPLEMENTAL BRIEF FOR RESPONDENTS

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APPENDIX 1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

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ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

SECOND SUPPLEMENTAL BRIEF FOR RESPONDENTS

INTRODUCTORY STATEMENT

On October 5, 1974 the Solicitor General filed an *amicus curiae* brief in this case. The Government's position, as stated in that brief, is that if any process is due to persons held in physical custody prior to trial

upon an information, the obligation is met by prosecutorial screening, bail hearings and expedited trials.

This, the third brief filed by the Respondents, focuses upon the Government's contentions. Our previous efforts have illustrated that a host of recent decisions compel the conclusion that the Respondents' claim to an opportunity to be heard after arrest but prior to trial is strong. Indeed, a comparison of the interests involved in this claim and those involved in *Mitchell v. W.T. Grant Company*, ____ U.S. ____, 94 S. Ct. 1895 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969); *Morrissey v. Brewer*, 408 U.S. 471 (1972); and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) compel the inescapable conclusion that persons held in jail solely upon a prosecutor's information have the strongest claim to a hearing. The Appendix to this Brief contains a chart which makes the comparison leading to that conclusion.

Faced with the recent due process decisions, the Government contends that they do not require a "formal procedure" to determine probable cause. Thus they present their prosecutorial screening, bail hearing, expedited trial trilogy as sufficient to meet due process standards. In doing so, the Government has overlooked the essential meaning of due process.

At the least due process, even in a preliminary inquiry, requires notice, an opportunity to confront and cross-examine adverse witnesses and the right to be heard by a neutral and detached person. *Morrissey v. Brewer*, 408 U.S. at 488-489. Against the most

minimum application of that standard, the Government's suggestions must be rejected.

In part one of this Brief we will demonstrate the deficiency in the Government's tripartite "hearing" procedure. Thereafter we will show that no rationale exists for denying an opportunity to be heard to misdemeanant defendants who are in jail awaiting trial. And finally, we will show that neither history nor the prior decisions of this Court justify the use of an unreviewed information to take a presumably innocent person's liberty without an opportunity to be heard.

I.

PROSECUTORIAL SCREENING, BAIL HEARINGS AND EXPEDITED TRIALS DO NOT, EITHER SINGLY OR IN SUM, MEET THE REQUIREMENTS OF THE RIGHT TO BE HEARD BY A NEUTRAL AND DETACHED PERSON COMMANDED BY THE DUE PROCESS CLAUSE.

A. Prosecutorial Screening Denies an Opportunity to be Heard.

The Respondents have consistently pointed out that an affirmance in this case would not diminish the prosecutor's role as the primary screening force in the decision to charge process. Respondents' Supplemental Brief 22-23. It would merely require a subsequent judicial review of the decision in a proceeding meeting due process requirements.

The reason for judicial oversight is simple. The prosecutor reviews the case brought by a complaining party, generally the police. He arrives at his conclusion based upon what the police present him. His ability to carefully determine probable cause is limited by the kind of information he receives. Even if a prosecutor is, as the Government asserts, naturally disinclined to prefer weak charges,[1] he has no real opportunity to test or verify the facts in the *ex parte* setting of his inquiry. Thus the best intentioned prosecutor may, because of the nature and manner of the information presented to him, find himself committed to an ill-founded prosecution.[2]

[1]While we do not question the general good faith of prosecutors, one cannot fail to recognize that factors other than wanting to win a case go into the decision to charge. Lewis R. Katz in *Justice is the Crime, Pretrial Delay in Felony Cases*, (1972), commenting upon the delicate balance in police-prosecutor relationships wrote:

> "Since both [offices] are working towards the same general goals, each is dependent upon the other's labors to facilitate its own work. As a result, prosecutors are fully aware that they cannot often refuse a police request to prosecute, and the police are aware that they cannot pressure for prosecution in too many questionable cases, for it is the prosecutor who ultimately must justify that decision in court."

Popularly elected prosecutors, like the Petitioner, also face political considerations which may affect their independence. These are also relevant factors in determining neutrality and detachment. See Point "B", *infra*.

[2]The record in this case is illustrative of that point. An assistant state attorney prepares an information after a complaining party or police officer comes into his office and talks to him. The information is reviewed by the Chief of the Complaint Division and forwarded to the State Attorney or one of his designated assistants for signature. App. 49-50. The Petitioner's Caseload Report for the Year Ended December 31, 1970 reflects that of the 7856 "disposed" felony and misdemeanor cases there were 1373 acquittals and 194 nol prosses. App. 62. If one excludes the 1373 categorized as "Other (Absentee Docket, etc.)" which were really not resolved, App. 62, approximately 16% of the prosecutions failed. These statistics do not reflect the number of cases in which an information "overcharged" a defendant. Since bond is set on the charge contained in an information, overcharges often result in unfair deprivations of pre-trial liberty which could be avoided by a preliminary hearing.

An opportunity to be heard subsequent to arrest would ameliorate the problems which always flow from ex-parte decisions. Justice Frankfurter stated:

> "... fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights... That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it is reached. Secrecy is not congenial to truth seeking and self righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it...."
>
> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170-172 (concurring opinion).

Prosecutorial screening cannot provide that opportunity. A subsequent judicial hearing can. Judicial review serves as a check and balance upon police-prosecutor initiation of charges. That concept is recognized by commentators, Breitel, *Controls in Criminal Law Enforcement*, 27 U. Chi. L. Rev. 427, 433 (1960) and by this Court:

> "... A democratic society, in which respect for the dignity of all men is central, naturally guards

> against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the over-zealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. . . ."
>
> *McNabb v. United States*, 318 U.S. 332, 343-344 (1943).

In response the Government argues that the screening process is so efficient that providing preliminary hearings would generally be a waste of time. Government Brief 41. They cite data showing high federal conviction rates and low state preliminary hearing dismissal rates to buttress their contention. Government Brief 41, n. 35; 67. However, their argument fails as a matter of law. Added to that, their statistics are suspect[3] and atypical.[4]

[3]Reliance upon the 97% conviction rate alluded to in *Pugach v. Klein*, 193 F. Supp. 630, 635 (S.D.N.Y. 1961) is inappropriate. That figure reflects felony prosecutions which must be commenced by indictment. Misdemeanor information cases in the federal system are, for the most part, unique to the District of Columbia. Government Brief 3-4. The 93% misdemeanor conviction rate in the District of Columbia excludes the 14% of charged persons whose cases are dismissed after completion of pre-trial diversionary programs. Some concern has been voiced that those programs encourage innocent people to waive their right to be heard. Goldberg, "Pre-trial Diversion: Bilk or Bargain?", 31 *NLADA Briefcase* 490, 499 (1973) And there is also reason to believe that persons incarcerated prior to trial are more likely to be convicted than those who were released. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964). See also Amicus Curiae Brief of The National Legal Aid and Defender Association 9-10. Consequently a denied preliminary hearing, insofar as it might have foreclosed pre-trial release from physical custody by making a bail hearing meaningful (see discussion *infra*), may contribute to the high conviction rate.

Seeking to deny preliminary hearings because few persons obtain dismissal then or at trial is but one step from the argument that we ought to consider foregoing trials because few are acquitted. That kind of logic has been rejected long ago:

> "To one who protests against the taking of his property without due process of law, it is no answer that in his particular case due process of law would have led to the same result because he

[4]The F.B.I.'s *Uniform Crime Reports for the United States*, 1973, show that of those charged with violent crimes, 32% were acquitted or had their charges dismissed; 12.7% were found guilty of lesser offenses and 3.2% were found guilty of the offense charged. Of those charged with property crimes, 14.9% were acquitted or had their charges dismissed; 5.0% were found guilty of lesser offenses and 34.8% were found guilty of the offense charged. Miscellaneous offenses ranging from "other assaults" to drunkenness and disorderly conduct reflect acquittal rates from 44.1% to 9.4%. The highest conviction rate in the lesser crime category was in drunkenness cases (88.2%). The single largest group other than drunkenness was a category called "All other offenses". Only 51.4% of those people were found guilty of the offense charged. *Id.* Table 18, p. 116.

The Government also errs in attempting to measure the usefulness of preliminary hearings only by the number of dismissed cases. First there is evidence that large numbers of cases are dismissed at preliminary hearings. Respondents' Brief 34.-35. Second, the benefits which flow from such an adversarial hearing extend beyond dismissal to informed decisions on bail, psychiatric treatment, and reduction of charges. *Coleman v. Alabama*, 399 U.S. 1 (1970).

had no adequate defense upon the merits. . . ."

Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915).

Due process guarantees not only the right to be heard, but the right to be heard by a neutral and detached person. The prosecutorial screening process fails to meet that test too.

B. The Prosecutor is Not Neutral and Detached.

The concept of "neutrality and detachment" is found in the Fourth Amendment and in the Due Process Clause. Compare *Shadwick v. City of Tampa*, 407 U.S. 345 (1970) with *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

The Government seeks to avoid the implication of the Fourth Amendment cases, *Shadwick* and *Coolidge v. New Hampshire*, 403 U.S. 443 (1970), by saying that a prosecutor issuing an information is not an investigative officer and thus does not fall within Fourth Amendment proscriptions. Government Brief 38. Yet, a few pages later, they say preliminary hearings are valueless because "both prosecutors and defense counsel have had too little time to investigate their case. . . ." Government Brief 44, n. 39. That statement recognizes the duality of the prosecutor's role.[5] Once he has decided to file an information based upon the

[5]It also recognizes the shortcoming of the screening process. One would hope that a prosecutor would have investigated a case prior to filing. But the *ex parte* charging process precludes that protection.

police report he then becomes inextricably entwined with the investigative function necessary to build the case. Since we are not asking for a hearing *prior* to the filing of an information it is of little consequence that he has generally been uninvolved up to the time the police officer presents himself.[6] But once the information is filed, a function which we would not deny a prosecutor, it cannot be said that the continued loss of liberty which results solely from his signature is being accomplished by a neutral and detached party.

In *Shadwick* a unanimous Court wrote:

> "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement. There has been no showing whatever here of partiality or affiliation of these [municipal court] clerks with prosecutors or police. The record shows no connection with any law enforcement activity or authority which would distort the independent judgment the Fourth Amendment requires."
>
> *Shadwick v. City of Tampa*, 407 U.S. at 350.

Clearly, prosecuting officials cannot make the same claim to neutrality and detachment.[7]

[6]There are many instances when the prosecutor's office initiates and supervises an investigation. When he has accumulated evidence which he believes establishes probable cause, he files an information. The Government takes no cognizance of this multi-purpose role of a prosecutor which completely negates their characterization of the prosecutor as an accusative officer and not an investigative officer.

[7]The due process standard requires an "independent" decision maker. *Morrissey v. Brewer*, 408 U.S. at 486. The Fourth Amendment cases are instructive for they define neutrality and detachment and in the context of this claim provide an insight into "independent". For the reasons that a state attorney runs afoul of the Fourth Amendment standard, he cannot be "independent" under the Due Process Clause.

Even if one could say that a prosecutor were neutral and detached in Fourth Amendment or due process terms, the heart of the Respondents' case would be unaffected. For our claim is not that the initial taking is invalid, (Respondents' Brief 13; Tr. of Oral Arg. 54-55), but merely that the taking without a later opportunity to be heard is invalid. This is a Fourteenth Amendment Due Process claim. Since we have already shown that prosecutorial screening affords no opportunity to be heard, whether a prosecutor is neutral and detached is important only insofar as it underscores the total lack of protection afforded to a person incarcerated upon an information.[8] We submit that the prosecutor's function makes it inappropriate for him to claim that he is so impartial that a judge may not inquire into his determination of probable cause.

C. Bail Hearings Do Not Provide the Opportunity to Be Heard On the Question of Probable Cause and Even if Release from Custody were the Issue in This Case, Such Hearings are Irrelevant to Those Charged with Non-Bailable Offenses and the the Indigent.

This case does not present the question of whether the Respondents are entitled to be at liberty upon bail.

[8] An additional consideration is found in the Fifth Circuit's view that "even the appearance of such entanglement between the prosecutorial and judicial functions as exists under the Florida information prosecution system" compromises any argument that a state attorney is sufficiently neutral, detached or independent to be the sole arbiter of probable cause. *Pugh v. Rainwater*, 483 F. 2d at 778.

The Government's effort to transform the issue into one of bail misses the point of this litigation. It poses the issue of whether defendants charged upon informations have a right to be heard prior to trial. The fact of physical custody is important only because in balancing due process claims, one consideration is the quality of the deprivation. Here it is the total taking of absolute liberty. If the Respondents had been released upon bond they would not have been foreclosed from claiming a denial of the right to be heard. A different consideration would merely be present when a court balanced the competing interests in assessing the due process claim.

For Pugh and the class he represents, bail hearings are a totally irrelevant proposal. Pugh was charged with robbery, a "life" offense which requires that bail be denied unless *he* showed that the proof of guilt was not evident nor the presumption that he committed the crime great. *Loper v. Stack*, 291 So. 2d 207, (4th D.C.A. 1974). The information not only denies a preliminary hearing, it denies bail.

Against that background we consider the utility of the bail hearings suggested by the Government to see if they can ever provide the rights asserted by the Respondents.

In the Florida system bail hearings do not provide for an opportunity to test probable cause. *Pugh v. Rainwater*, 483 F.2d at 781, n. 8. Of course, the filing of an information would preclude such an inquiry. *State ex rel. Hardy v. Blount*, 261 So. 2d 172 (Fla. 1972). An information filed against a misdemeanant in the federal system would likewise preclude a probable

cause inquiry. Rule 5(c), Federal Rules of Criminal Procedure.

While the "weight of the evidence against the accused" (18 U.S.C. Sec. 3146(b)) is a federal consideration in setting bail, it is a far cry from being what the Government calls the "functional equivalent of the (preliminary) hearing". Government Brief 52. The difference is a matter of form and substance.

The bail hearing provides no opportunity to confront, cross-examine or present evidence on the question of probable cause. At best it is an informal inquiry into the case and the prosecutor's view of the strength of it. The defect in the decision to charge process infects the prosecutor's response and destroys the contention that the bail hearing provides a safeguard against improvident prosecutions. The prosecutor's view of his case is one-sided. He conveys that to the court either orally or by the affidavit procedure the Government suggests. There is no opportunity to effectively confront that kind of presentation. The bail hearing merely perpetuates the denial of the opportunity to be heard.

That ongoing failure makes the decision on bail itself suspect. Providing the opportunity to be heard on the question of probable cause would improve fairness in bail decisions. This Court has recognized the usefulness of preliminary hearings in setting bail. *Coleman v. Alabama*, 399 U.S. 1 (1970). Given the long lament of legal scholars over the bail system,[9] one wonders if the

[9]See Goldfarb, *Ransom* (1965); Kasanof and Single, "The Unconstitutional Administration of Bail: Bellamy v. The Judges of New York City", 8 Crim. L. Bull. 459 (1972); A Program for Prison Reform in the United States, Final Report of the Annual

Government should not be arguing for preliminary hearings in order to make bail decisions more informed for the sake of society as well as defendants.

Any doubt about the Government's attempt to circumvent the right to be heard via bail hearings is resolved by considering the available recent statistical data on the utility of bail. In mid-year 1972, the total local jail population in the United States was approximately 141,600 persons. Of that number, 50,800 were awaiting trial. Thirty thousand five hundred were in other stages of adjudication, including some who were arrested but not yet arraigned. Of the awaiting trial group, approximately 5,700 were charged with minor offenses including traffic, drunkenness, petit larceny and simple assault. The average delay for those awaiting trial was three months. Nearly 50% of the total number of persons incarcerated were held in the jails of six states: Florida, California, Texas, New York and Pennsylvania.[10]

Chief Justice Earl Warren Conference on Advocacy" (1972). Recommendation XI of that report included these views:

> "The presumption of innocence should pervade our system of criminal justice at all pre-conviction stages. But our present bail and release on recognizance systems do violence to that principle and are discriminatory and arbitrary . . . (U)nder our present practices half or more of accused persons are detained in jail pending trial."

[10]See: *Survey of Inmates of Local Jails; Advance Report.* United States Department of Justice, National Law Enforcement Assistance Administration, National Criminal Justice and Statistic Service, Table B. p. 17, and text pp. 5-6 (1974). An earlier report, the *1970 National Jail Census*, United States Department of Justice, National Law Enforcement Assistance Administration, National Criminal Justice Statistic Service at pp. 3 and 10 (Table 2) (1971), reflected that Florida was one of the six states which held over half of all the pre-trial detainees.

According to the Government, 15 to 20% of those charged with misdemeanors in the District of Columbia are unable to make bail pending trial. Government Brief 4. They remain incarcerated for substantial time periods. Government Brief 47-48 n. 41.[11]

Neither federal nor state bail hearings provide the chance to be heard on the issue of probable cause. That denial, to one who is presumed innocent and deprived of his absolute right to liberty, makes the hearing meaningless in the due process context posited by this case. The hearing is certainly devoid of value to people who, like the Respondents, are either not entitled to bond or cannot afford the bail set. App. 6, 10, 31. Thousands of people in the state and federal systems share those problems. The bail system has been of limited use in securing the right to release pending trial. It is useless in securing the right to be heard on probable cause. *State ex rel. Hardy v. Blount, supra;* Rule 5(c), Federal Rules of Criminal Procedure.

D. Expedited Trials and Calendar Control are Not a Valid Response to the Denial of an Opportunity to Be Heard Prior to Trial.

The expedited trial part of the trilogy proposed by the Government is the relief to be afforded if all else

[11]One of the Government's statistics is of limited value. It shows that 60.8% of the cases are disposed of betweenn zero and 45 days. But we have no way of knowing how many in that group are tried near the end of the 45-day period. What is clear is that over 14% are not tried within 90 days. Government Brief 48.

fails. But it comes too late. What difference does it make if a defendant is tried in 30, 60 or 90 days if he should not be tried at all? The probable cause hearing focuses upon the issue of whether trial is appropriate. The expedited trial does not address that consideration, which for a person presumed to be innocent, is an important one.

Moreover, there is evidence supporting the proposition that preliminary hearings will encourage speedy trials. The record in this case, reflecting a 20-25% decrease in the felony court caseload, shows that preliminary hearings, by dismissing cases, reducing charges and accepting pleas, aids in attaining that goal.

The length of pre-trial incarceration for jailed misdemeanants in the District of Columbia is already long without preliminary hearings. The Government can only speculate on the impact that preliminary hearings would have. The Solicitor General's pessimism may be unfounded. In any event, the Government forgets that an escape valve exists if they find preliminary hearings intolerable. They may indict instead of using an information. Indeed, the alarm sounded by the Government is even too shrill for the state system. They too may indict.[12] Whether such a response would run afoul of due process arguments similar to those made here is a question for another day. (See Tr. of Oral Arg. 60.)

The point is that preliminary hearings may expedite, not retard, criminal proceedings. But no matter the

[12]The option of indictment also provides an alternative for those who fear that the cost of providing due process is too great. That is discussed *infra*.

effect, rushing to trial is no response to this due process claim. The Government plan would pose a grisly Hobson's choice for incarcerated defendants: give up your preliminary right to be heard or face immediate trial even if you are not ready. That may not even be fair to the Government if they have not completed their investigation.

What is apparent throughout the Government's Brief is concern for the cost of providing preliminary hearings. The expedited trial suggestion is part of that concern and so we turn to that consideration.

E. Considerations of Cost and Efficiency Do Not Bar the Respondents' Claim.

Problems of cost and efficiency are not new responses to constitutional claims. This Court has answered by saying:

> "A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See *Bell v. Burson, supra,* at 540-541; *Goldberg v. Kelly, supra,* at 261. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.
>
> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." Stanley v. Illinois, 405 U.S. 645, 656."
>
> *Fuentes v. Shevin,* 407 U.S. at 90 n. 22. See also *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969).

Those thoughts are especially appropriate to the taking of liberty involved here.

It costs are to be measured at all, they may be offset by the positive attributes of preliminary hearings. Reduced jail populations resulted from the initial *Pugh* decision and the implementation of a local preliminary hearing plan. *Pugh v. Rainwater,* 355 F. Supp. at 1291; App. 109. Added to those savings are the cost of human misery which may be alleviated by a preliminary hearing. Consider the description of one relatively recent inmate of the District of Columbia jail:

> "The first night we were very impressed with the D.C. jail. It was always around 100 degrees and you dripped sweat. At nine or ten o'clock they put the lights out, and for a whole hour persons just screamed at each other and the guards and everything else. It's like something out of Dante – screams, cursing and so forth. I asked one of the old-timers and he said it is like this every night – just letting off steam like the hour of frustration."
>
> *Harper's Magazine,* October 1974, pp. 56-57.

Since most jailed federal misdemeanant defendants reside in the District of Columbia jail, it is appropriate

to turn to the Government's request that any requirement for preliminary hearings be confined to felony cases.

II.

INCARCERATED PERSONS CHARGED WITH MISDEMEANORS BY A PROSECUTOR'S INFORMATION ARE ENTITLED TO A PRELIMINARY HEARING.

A person held for trial upon a misdemeanor charge is deprived of his liberty as surely as a felony defendant. The jail cell looks the same to each. While the Constitution may call for different methods of initiating felony and misdemeanor prosecutions, the Due Process Clause draws no bright lines around one kind of lost liberty. It is disingenuous to suggest that a misdemeanant's pre-trial liberty is less valuable than a felony defendant's. The Court has recognized the harm which flows from any incarceration. *Baldwin v. New York*, 399 U.S. 66, 73 (1970); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

The same principles which require a hearing for jailed felony defendants apply to jailed federal misdemeanor defendants. Since misdemeanor trials do not occur quickly in the District of Columbia, the National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, Commentary to Standard 4.3 (1973) is no defense.[13]

[13]The Commentary views the preliminary hearing's protection against an unjustified trial unnecessary if a quick trial occurs in misdemeanor cases. Dade County, Florida, is attempting to meet that goal. Brief for Respondents, 25, n. 15. The Federal system apparently cannot. Government Brief 47-48, n. 41.

The vast bulk of misdemeanor prosecutions do not involve pre-trial or post-trial incarceration. The Government's fear that 15-20% of the four to five million misdemeanor prosecutions in the country would require preliminary hearings, Government Brief 46, n. 40, is unfounded. The statistics regarding the number of people in local jails awaiting trial, *supra*, should allay that trepidation.[14] See also Brief for Respondents 26, n. 16.

The request to exclude jailed federal misdemeanor defendants from preliminary hearing requirements should be rejected. It is constitutionally incongruous to prohibit one day of incarceration after trial unless a lawyer is provided or properly waived (*Argersinger*), but on the other hand condone lengthy pre-trial incarceration without a hearing.

III.

NEITHER THE PRIOR DECISIONS OF THIS COURT NOR HISTORY JUSTIFY THE DENIAL OF A PRELIMINARY HEARING TO PERSONS INCARCERATED UPON INFORMATIONS.

A. The Prior Decisions.

The Respondents have always begun their arguments by analogizing this case to the recent decisions which

[14]The figures showing the number of people who do not benefit from bail hearings in any way do not reflect the number of preliminary hearings which might be required under the facts of this case. Many of those awaiting trial were indicted, a process not under scrutiny here. The fact that only nine states filed amicus curiae briefs, and only one of those, Washington, shares the Florida process, attests to the limited impact an affirmance will have on the criminal justice system. In the federal system some 1300 cases would be affected. Government Brief 4.

involved similar, but less important, deprivations of liberty or property. The Petitioners and those supporting their position see their strongest support in *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woom v. Oregon*, 229 U.S. 586 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914). Those, and other cases have already been analyzed by the Court of Appeals, by us, Respondents' Brief 27-30, and in the amicus curiae brief of the National Legal Aid and Defender Association.[15] Fairly read, they do not counter the arguments we advance.[16]

Here we merely reiterate that the issue of preliminary hearings prior to arrest is not presented. The provisional remedy of arrest, which is necessary to enable a court to assert its jurisdiction over a defendant for subsequent

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[15]We would add to the NLAD Brief by submitting that *Costello v. United States*, 350 U.S. 359 (1956) and *Lawn v. United States*, 355 U.S. 339 (1959) focus upon considerations much different from those presented here. Thus, their dicta, even though it does not bar our claim, is of limited value.

[16]If by some stretch of logic it could be said that those cases in any way determine the contemporary claims of this case, the adage "Law must govern life, and the very essence of life is change" is a thought worthy of consideration. Pound, *Criminal Justice in America* 36 (1930). So too is Justice Pitney's comment, responding to an argument that due process is immutable:

> "... to hold that such a characteristic [immutability] is essential to due process of law would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."
>
> *Hurtado v. California*, 110 U.S. 516, 529 (1884).

trial is unaffected by a subsequent judicial determination of probable cause. So *Ocampo's* comment that determining probable cause for "arrest" may be delegated to a quasi-judicial officer does not mean that the decision to arrest forecloses judicial review prior to trial.[17] Even a search warrant, issued by a judicial officer may be reviewed prior to trial in an adversary setting. Yet the Government would have us believe that liberty, taken by a prosecutor's *ex parte* information and the warrant that issues thereafter is beyond scrutiny until trial. No case supports that proposition.

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[17]The Government's misunderstanding of this distinction is apparent thoughout their brief. Thus they quote cases which are inapposite. For instance, *United States ex rel. Hughes v. Gault*, 271 U.S. at 149:

> "The Constitution does not require any preliminary hearing *before* a person charged with a crime against the United States *is brought* into the court having jurisdiction." (Emphasis supplied.)
>
> Government Brief 29-30, n. 25;

and *United States v. Bland*, 472 F. 2d at 1337:

> "We cannot accept the hitherto unaccepted argument that due process requires an adversary hearing *before the prosecutor can exercise his ago-old function* of deciding what charge to bring against whom." (Emphasis supplied.)
>
> Government Brief 42, n. 36.

The error is perpetuated to the end of their Brief when they utilize *Calero-Toledo v. Pearson Yacht Leasing*, ___ U.S. ___, 94 S. Ct. 2080 (1974). The taking without a hearing in that case was necessary to assert jurisdiction over the boat before it was removed from the jurisdiction. We have no quarrel with that process as long as there is a chance for early subsequent review.

B. History.

The historic purpose of the preliminary hearing remains unchanged today:

> "The object or purpose of the preliminary [hearing] is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based."
>
> *Thies v. State*, 178 Wis. 98, 189 N.W. 539, 541 (1922).

The emergence of public prosecutors in the United States did not render preliminary hearings superfluous. Every state provides for such hearings. Respondents' Brief, App. 1a - 2a. From the amicus curiae briefs filed in this case, it appears that they are both used and useful. While the prosecutor has "provided a new and professional medium of screening" as the Government submits, there is no reason to think he has supplanted preliminary hearings. His function is complemented by a preliminary hearing which permits an opportunity to be heard.

It would be ironic if the *ex parte* prosecutorial determination were now considered to obviate the impartial probable cause inquiry which gradually evolved in England, merely because the English inquiry preceded the formal charge. That would result in a step backwards and yet the Government argues for it: The

preliminary hearing is emptied of its normal and traditional purpose if it is held after the filing of . . . an information". Government Brief 28.

It appears that only a handful of states agree with that proposition. "In most jurisdictions an information may not be filed unless a judge is convinced that probable cause exists." Katz, *Justice is the Crime, Pretrial Delay in Felony Cases* 17 (1972) (footnote omitted). The caution is well founded:

> "Evidence exists from the reign of Edward I that the king, through his legal representatives, the sejeant of treason or the sejeant of felony (forerunners of the modern prosecutor) accused persons of felony or misdemeanor cases in the Court of The Star Chamber and thus avoided the grand jury."
>
> *Id*, Katz at 16:
>
> "The information procedure was eventually misused by Crown officials through malicious prosecutions. This abuse was remedied by the Statute of 4 Will. & Mary, c. 18 (A.D. 1692) which forced the Master of the Crown Office into a proceeding with a magistrate. 1 J. Stephen, *A History of the Criminal Law of England*, 294-97 (1883)."
>
> *Id* at 16-17, n. 34.

We imply no malice in present day prosecutors. But history does suggest that any secret, *ex-parte* determinations made by police and prosecutors which substantially affect a person's right to liberty, ought to be open to subsequent judicial review.

By asking that this Court clothe informations with sanctity until trial, the Government is seeking a radical

enlargement of prosecutorial powers throughout the United States. We submit that their arguments must be rejected.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

1a

A COMPARISON OF INTERESTS RELEVANT TO DUE PROCESS DETERMINATIONS

CASE	THE RIGHT INVOLVED	THE DEFENDANT'S CLAIM TO THE LIBERTY OR PROPERTY	THE HARM CAUSED TO DEFENDANT BY VIRTUE OF THE DEPRIVATION	THE OPPOSING PARTY'S INTEREST IN THE TAKING	WAS THERE JUDICIAL SUPERVISION OF TAKING UNDER ATTACKED STATUTORY SCHEMES?	IS THERE JUDICIAL SUPERVISION OF TAKING UNDER SUPREME COURT DECISION?	THE METHOD OF REGAINING LOST INTEREST FOR THOSE FINANCIALLY ABLE	PREREQUISITES FOR TAKING UNDER ATTACKED SCHEME	THE REMEDY FOR IMPROVIDENT TAKING	PRESENT PROCEDURES AVAILABLE TO PRELIMINARILY TEST THE VALIDITY OF THE TAKING	STATE'S OBJECTION TO PROVIDING PROMPT PRELIMINARY HEARINGS DEMANDED BY THE DEFENDANTS	IS ATTEMPTED DEPRIVATION BASED UPON UNDERLYING WRITTEN AGREEMENT?
Gerstein v. Pugh	Liberty	Absolute	Loss of Freedom; possible loss of job, reputation; possible physical or emotional injury in jail	To assert Jurisdiction for trial (continued physical custody not essential)	No	----	Bond, at discretion of judicial official	Arrest, filing of information (or information, arrest)	None	None	Economy and efficiency	No
Mitchell v. W.T. Grant	Property	Conditional	Loss of use of stereo, stove, refrigerator, washing machine	To recover property and protect against loss or depreciation pending trial	Yes	Yes	Absolute right to regain property through posting of bond.	Demand and bond	Action against bond; availability of attorneys fees and damages for injury to social standing reputation, humiliation and mortification.	Immediate post-deprivation adversarial hearing upon request	Economy, efficiency, protect creditors' rights to property	Yes, signed conditional sales contract
Fuentes v. Shevin	Property	Conditional	Loss of use of stereo and stove	To recover property and protect against loss or depreciation pending trial	No	Yes	Absolute right to regain property through posting of bond.	Demand and bond	Action against bond	Automatic prior hearing	Economy, efficiency, protect creditors' rights to property	Yes, signed conditional sales contract
Sniadach v. Family Finance Corporation	Property	Absolute	Loss of up to 50 percent of wages	To insure payment of alleged debt	No	Yes	None	Demand and bond	Action for return of money	Automatic prior hearing	?	Yes, signed promissory note
Morrissey v. Brewer	Liberty	Conditional	Loss of freedom; possible loss of job; possible physical or emotional injury in jail	To impose punishment upon convicted defendant	Initially, at sentencing, yes. Thereafter, no.	No, although a neutral and detached arbiter is required.	None	Adjudication, sentence, parole, rearrest	Habeas corpus	Automatic subsequent adversarial hearing after arrest	Economy, efficiency	Yes, parole agreement (not clear if signed)
Gagnon v. Scarpelli	Liberty	Conditional	Loss of freedom; possible loss of job; possible physical or emotional injury in jail	To impose punishment upon convicted defendant	Initially at sentencing, yes. Thereafter, no.	No, although a neutral and detached arbiter is required.	None	Adjudication, sentence, probation, rearrest	Habeas corpus	Automatic subsequent hearing after arrest (ability to cross-examine witnesses depends on geographical circumstances)	Economy, efficiency	Yes, signed probation agreement